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A lawyer usually encounters competence issues with either (a) a potential new client whose competency is suspect, or (b) a current client who is now clearly incompetent or whose capacity is at least questionable.

California Rules of Professional Conduct

Surprisingly, there are no specific rules in California Rules of Professional Conduct (CRPC) that directly address the issue of dealing with the mentally impaired client. The CRPC were revised in 1989. At that time, California elected not to adopt the Model Rules of Professional Conduct (MRPC) that were promulgated by the American Bar Association in 1983. In addition, there are no controlling California cases. There are three California ethics opinions that represent the minority view, and one more recent opinion that follows the majority view.

ABA Model Rules

The ABA Rules represent the majority view, and are followed in some forty states. The ABA Model Rules address the issue of the mentally impaired client in MRPC 1.14, Client Under a Disability, which reads as follows:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.[1]

American College of Trust & Estate Counsel Commentaries

The American College of Trust & Estate Counsel (ACTEC) published Commentaries on the Model Rules of Professional Conduct because the College perceived that the MRPC did not provide "sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in trusts and estates practice." Recognizing the need to fill the gap,

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ACTEC has developed commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities.[2] The commentaries were first adopted in October 1992, a second edition was published in March 1995 and a third edition was adopted in March 1999.[3]

The format of the commentaries is to state the MRPC and then offer comments on the application of the rule and provide annotations including cases, ethics opinions and published articles.

It is instructive to consider the four basic themes that the ACTEC commentaries state are appropriate to our practice area:

1. The relative freedom that lawyers and clients have to write their own charter for representation in the trusts and estates field;
2. The generally non-adversarial nature of trusts and estates practice;
3. The utility and propriety, in this area of the law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and
4. The opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC.

Guide to California Rules of Professional Conduct for Estate Planning Trust and Probate Counsel

In 1997, the Estate Planning, Trust and Probate Section of the State Bar of California published *Guide to California Rules of Professional Conduct for Estate Planning Trust and Probate Counsel* to assist California trusts and estates lawyers by providing commentaries similar in concept and format to the ACTEC commentaries but directed to California's particular situation, and taking into account that California has not adopted the MRPC.[4] This publication is available for purchase from the State Bar of California.

Bar Association of San Francisco Ethics Committee Opinion

A new opinion was drafted by the Ethics Committee of the Bar Association of San Francisco (BASF) and published on September 8, 1999 as Opinion 1999-2. This Opinion recommends a position similar to that contained in MRPC 1.14, the ACTEC commentaries and the State Bar Estate Planning Section publication.[5]

American Law Institute Restatement of the Law Governing Lawyers

The American Law Institute is also circulating a final draft of the *Restatement of the Law Governing Lawyers,* which indicates that adjustments must be made in the attorney-client relationship when the client is impaired. The lawyer must exercise informed judgment in choosing among "imperfect alternatives."[6] These include discussions of the issue with a client's medical providers or relatives, bringing the issue to the attention of the court, and the discretion to seek a conservatorship.[7]

Preventive Measures for Competent Clients

Lawyers must be sure to advise clients to take protective action while clients are still competent, and they must take measures to protect clients' interests in the event of diminished mental capacity. The following measures should be considered:

1. Durable powers of attorney for asset management (either current or springing powers) and healthcare decisions;
2. Declaration under the Natural Death Act (living will);
3. Revocable trusts that must specify how determination as to incompetency is made and the procedure for appointment of a successor trustee;
4. Designation of a conservator (can be in the durable power of attorney or otherwise); and
5. It has been suggested that it may be appropriate to include a provision in a durable power of attorney, whereby the agent could waive the attorney-client or physician-patient provision on behalf of the principal under appropriate circumstances.

Measures to Consider for Prospective/Current Clients

If there is a new client whose competence is questionable, the attorney can refuse to accept the engagement at any stage until formal acceptance. The attorney may need more information or an evaluation by a mental health professional to make a decision. The attorney should also consider the family relationships, the likelihood of a challenge to any

proposed documents, and whether the attorney is prepared to take on the possible aftermath.

Discretion to Protect a Mentally Impaired Client

Issue: Does a lawyer have implied authority to act in the best interests of a mentally impaired client?

Majority View

The majority view is represented in MRPC 1.14, which allows an attorney to seek appointment of a conservator or take other protective measures on behalf of a client, but only when the lawyer reasonably believes the client cannot adequately act in his or her own best interests. The lawyer may, among other things, "seek guidance from an appropriate diagnostican."[8]

The ACTEC commentary on MRPC 1.14 adopts this majority view and states, in part:

> The lawyer for a client who appears to be disabled may have the implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated in his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client.[9]

In February 1997, the comment to MRPC 1.14 was amended to include recommendations with respect to a lawyer's disclosure of the client's condition and the rendering of emergency legal assistance. Specifically, comment 6 provides that:

> In an emergency where the health, safety or financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on that person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available.[10]

In such cases, the lawyer should act only "to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm."[11] In addition, the lawyer "should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action."[12]

The Ethics Committee of the Bar Association of San Francisco County concluded that:

> An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem.[13]

Minority View

Until this recent opinion, there was no authority that permitted an attorney to seek appointment of a conservator or seek the advice of a physician. This was premised on the California position that a lawyer had an "absolute" duty of confidentiality to the client.

The State Bar of California Committee on Professional Responsibility and Conduct issued a formal opinion stating that, without the client's consent, a lawyer may not initiate conservatorship proceedings on the client's behalf even though the lawyer believes it is in the client's best interests. It is impermissible because of the possibility the lawyer will disclose confidential information.[14]

This Opinion appears to disregard the possibility that the lawyer may limit disclosures to matters that do not involve confidential communications. In addition, the opinion ignores the possibility that the lawyer could limit disclosures to otherwise confidential information that the client would want disclosed, so the disclosure is impliedly authorized by the client or required by the lawyer's duty of loyalty to the client.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee found that a lawyer could not initiate an involuntary conservatorship for a present or former client due to an impermissible conflict of interest.[15]

The Orange County Bar Association Committee on Professionalism & Ethics found that a court-appointed attorney for a person suffering from

dementia could not disclose any facts that were adverse to the client.[16]

Analysis

The problem with the minority view opinions is that they seem to place more importance on the duty of confidentiality than on the best interests of a mentally impaired client who needs protection to protect his or her interests. The Opinion issued by the Ethics Committee of the Bar Association of San Francisco County presents a more enlightened view.

Options

May the lawyer talk to family members, if available, about any concerns regarding the client in general (i.e., appearance, speech, thought process, physical manifestations) without disclosing specific information discussed in an interview? An expression of concern by the attorney may prompt family members to initiate an action.

May the lawyer talk to the client's physician (with or without the client's permission) concerning the disability?

ABA Informal Opinion 89-1530 finds an implied authority for an attorney to disclose information to the extent necessary to serve the best interests of a client reasonably believed to be disabled:

> [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is *impliedly authorized* within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability.[17]

ABA Formal Opinion 96-104 (August 1996) specifically authorizes a lawyer who reasonably believes a client has become incompetent to handle his or her own affairs to take protective action on behalf of the client, including petitioning for appointment of a conservator. The protective action should be the least restrictive under the circumstances. Appointment of a conservator is a serious deprivation of client's rights and should not be undertaken if other, less drastic, measures are available.

With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. However, a lawyer with a disabled client should not attempt to represent a third party petitioning for guardianship over the lawyer's client.[18]

An opinion issued by the Oregon State Bar Association permits a lawyer who has represented a client for many years and begins to observe extraordinary behavior by the client to take action on behalf of the client. The lawyer may speak to a spouse, or child in an effort to end inappropriate conduct.[19] The opinion notes:

> An attorney in such a situation must reasonably believe that there is a need for protective action and must then take the least restrictive form of action necessary to address the situation. If, for example, Client is an elderly individual and Lawyer expects to be able to end the inappropriate conduct by talking to Client's spouse or children, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate.[20]

The Ethics Committee of the Bar Association of San Francisco County notes, "the attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client."[21]

Testamentary Capacity

If you are asked to make changes in the client's estate plan, what can you do? Is there guidance?

Criteria for Testamentary Capacity

California Probate Code Section 6100.5 holds that a client is not competent to make a will if, (a) he or she does not have mental capacity to (1) understand the nature of the testamentary act, or (2) understand and remember the nature and extent of his or her property, or (3) remember and understand his or her family relations and those whose interests are affected by a will; or (b) he or she suffers from a mental disorder such as delusions or hallucinations which would result in the client leaving property in a way he or she wouldn't but for the delusions or hallucinations.[22]

California Probate Code Sections 810 through 813 (Due Process in Competency Determination Act) is often used as a guideline to make a determination as to mental competency.[23]

The substituted judgment standard is often applied in conservatorship proceedings.

> ACTEC Commentary on MPRC 1.14:
>
> If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.
>
> In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including so-called substituted judgment proceedings.[24]

The San Diego County Bar Association Legal Ethics Committee has stated that a lawyer must be satisfied that the client is competent to make a will, and once the issue of capacity is raised in the lawyer's mind, it must be resolved. The lawyer should schedule an extended interview with the client, and keep a detailed and complete record of the interview. If the lawyer is not satisfied the client has capacity, the lawyer may decline to act and permit the client to seek other counsel, or may recommend the initiation of a conservatorship.[25]

It is often the case with the elderly or an impaired client that the lawyer may be the only person in a position to take action and with the knowledge to recommend appropriate action. Consider the common situations of a widow with no children or a client subject to undue influence by relatives, caregivers or persons in a position to take advantage of the impaired person.

There are methods to address confidentiality issues: information filed under seal, and in camera in a court proceeding.

Lawyer's Duty to Client After Appointment of a Fiduciary

ACTEC commentary to MRPC 1.14 states that a lawyer may have a continuing duty to the client and may continue to meet with and counsel the client. A conflict may arise if a fiduciary proposes to take action the lawyer believes is adverse to previously expressed wishes of the client, or is simply not in the client's best interests.[26]

Lawyer's Duties in Court Proceedings

There is no clear guidance in California. As the Ethics Committee of the Bar Association of San Francisco County points out, there is some guidance in criminal proceedings.[27] Counsel in these cases may or may not be mandated by the court to speak if the defendant's mental capacity is in question. This may be cold comfort in civil matters in which incarceration or more serious sentences are not at stake and there are no statutes that dictate an approach for the attorney.

In any event, it does disservice to the client and to the profession to adhere to the view that supports following client's wishes at all costs when it is clear the client is incompetent to make appropriate judgments for his or her own protection (i.e., litigating to defeat imposition of a conservatorship). The lawyer should balance the client's expressed wishes against the client's capacity and best wishes (as viewed by others). If the client is severely mentally impaired, the lawyer should have greater latitude to make a "best interests" judgment as to how to proceed; the less impaired the client, the more responsibility the lawyer has to try to follow the client's wishes.

Endnotes

1. MODEL RULES OF PROF'L CONDUCT R. 1.14 (1995).

2. AM. COLL. OF TRUST & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT, Introduction [hereinafter ACTEC COMMENTARIES].

3. *Id.*

4. ESTATE PLANNING, TRUST & PROBATE SECTION OF THE STATE BAR OF CAL., GUIDE TO CALIFORNIA RULES OF PROFESSIONAL CONDUCT FOR ESTATE PLANNING TRUST AND PROBATE COUNSEL (1997).

5. Ethics Comm. of the Bar Ass'n of San Francisco County, Op. 1999-2 (1999).

6. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Final Draft).

7. *Id.*

8. MODEL RULES OF PROF'L CONDUCT R. 1.14 (1995).

9. ACTEC COMMENTARIES, *supra* note 2, Introduction.

10. *Id.* Cmt. 6.

11. *Id.*

12. *Id.*

13. Ethics Comm. of the Bar Ass'n of San Francisco County, Op. 1999-2 (1999).

14. State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 1989-112 (1989).

15. Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., Op. 1988-450 (1988).

16. Orange County Bar Ass'n Comm. on Professionalism & Ethics, Op. 95-002 (1995).

17. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 89-1530 (1989) (emphasis added).

18. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 96-104 (1996).

19. Oregon State Bar Ass'n, Formal Op. 1991-41 (1991).

20. *Id.*

21. Ethics Comm. of the Bar Ass'n of San Francisco County, Op. 1999-2 (1999).

22. CAL. PROB. CODE § 6100.5 (West 2001).

23. CAL. PROB. CODE §§ 810-13 (West 2001) (Due Process in Competency Determination Act).

24. ACTEC COMMENTARIES , *supra* note 2, cmt. on MPRC 1.14.

25. San Diego County Bar Ass'n Legal Ethics Comm., Op. 1990-3 (1990).

26. ACTEC COMMENTARIES , *supra* note 2, cmt. on MPRC 1.14.

27. Ethics Comm. of the Bar Ass'n of San Francisco County, Op. 1999-2 (1999).